

**NOS. 15-1184, 15-1185, 15-1186, 15-1187, 15-1274, 15-1323, 15-1342**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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IN RE EFFEXOR XR ANTITRUST LITIGATION

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*On Appeal from the United States District Court  
for the District of New Jersey  
Lead Case No. 3:11-cv-05479-PGS-LHG*

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**MOTION OF FEDERAL TRADE COMMISSION TO FILE  
SUPPLEMENTAL BRIEF OF AMICUS CURIAE  
SUPPORTING PLAINTIFFS-APPELLANTS**

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Pursuant to Federal Rule of Appellate Procedure 29(f), the Federal Trade Commission (FTC) respectfully submits this motion to file a supplemental *amicus curiae* brief. The proposed brief addresses an issue that was not raised in the opinion below but is presented in defendants-appellees' briefs as an alternative ground for affirmance. The FTC's proposed *amicus* brief is being submitted simultaneously with this motion and is timely filed within the schedule for plaintiffs-appellants' reply briefs.<sup>1</sup>

On November 17, 2015, the FTC filed an *amicus curiae* brief supporting plaintiffs-appellants. That brief was limited to the question whether the district

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<sup>1</sup> Plaintiffs do not oppose the FTC's submission of a supplemental *amicus* brief, but defendants have indicated that they intend to oppose it.

court erred when it treated Wyeth's submission to the FTC of its proposed settlement with Teva, and the FTC's decision not to object, as a valid antitrust justification for an allegedly anticompetitive reverse-payment settlement. In their February 16, 2016, responding briefs, defendants-appellees made an argument not addressed by the district court: that their settlement agreement is exempt from antitrust scrutiny under the *Noerr-Pennington* ("*Noerr*") doctrine. Because the district court's opinion made no mention of the *Noerr* doctrine, the FTC's earlier *amicus* brief did not discuss the issue that defendants now ask this Court to decide.

As one of the primary government agencies charged with enforcement of the federal antitrust laws, the FTC has a strong interest in the proper application of the *Noerr* antitrust exemption. For more than twenty-five years, the agency has helped to shape the law and policy contours of the *Noerr* doctrine.<sup>2</sup>

Defendants' arguments about the scope of the *Noerr* doctrine have implications beyond the confines of this case. As a result, it is particularly

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<sup>2</sup> See, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-26 (1990); *In the Matter of Union Oil Co.*, 138 F.T.C. 1, 17-78 (2004); Brief of the United States and the Federal Trade Commission, *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, Nos. 86-7734, 86-7758 (2d Cir. Oct. 24, 1986); Memorandum of Law of *Amicus Curiae* the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss, *In re Buspirone Antitrust Litigation*, MDL Dkt. No. 1410 (S.D.N. Y. Jan. 8, 2002); FTC Staff Report, *Enforcement Perspectives on the Noerr-Pennington Doctrine* (2006), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf).

important that the Court have the views not only of the parties, whose interests may be confined to the specific controversy at hand, but also of the federal antitrust enforcer, with an economy-wide perspective and a significant stake in the proper application of *Noerr*.<sup>3</sup>

For the foregoing reasons, the FTC respectfully seeks leave to file a short supplemental brief to address defendants' *Noerr* argument.

Respectfully submitted,

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BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION

March 17, 2016

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<sup>3</sup> The combined word count of the FTC's initial *amicus* brief and the proffered supplemental brief is under the 7,000 words permitted for *amicus* briefs.

**CERTIFICATE OF SERVICE**

I filed the electronic PDF version of this motion with the Court via the CM/ECF system. The docket for this proceeding indicates that all participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

March 17, 2016

s/ Michele Arington  
Michele Arington